Aims Cyberjaya Sdn Bhd v Ahmad Zahri bin Mirza Abdul Hamid

COURT OF APPEAL(PUTRAJAYA) — APPEAL NO W-02(A)-287–02 OF 2017
HAMID SULTAN, BADARIAH SAHAMID, MARY LIM JJCA
29 NOVEMBER 2018

Labour Law — Employment — Termination — Early termination of respondent by applicant — Industrial Court found respondent's termination from applicant's employment to be without just cause or excuse — High Court judge dismissed applicant's application for judicial review — Whether there were two separate legal entities — Whether contracts of employment were fixed term contracts — Whether respondent who was foreign national could be permanent employee

The respondent had entered into a total of six contracts of employment ie the first three contracts were with AIMS Data Centre 2 Sdn Bhd ('AIMS Data Centre 2'), and the fourth to sixth contracts were with the appellant, AIMS Cyberjaya Sdn Bhd ('applicant'). Sometime in September 2013 during the duration of the fourth contract, the respondent received a letter from the applicant which offered him appointment under the fifth contract. The respondent was unhappy with the terms of the fifth contract and the applicant offered the sixth contract for a term of three months. According to the applicant, the three-month contract period from was to provide the respondent time to reconsider the terms of the fifth contract. On 1 October 2013, the respondent informed the applicant that he was not accepting the fifth contract. Pursuant thereto, the applicant issued a letter dated 18 October 2013 which provided the respondent with an early release of his employment with the applicant with effect from 19 October 2013. The respondent was paid his full salary for the month of October 2013 as well as two months salary for the balance of the remaining two months viz November and December in lieu of notice under the sixth contract. The respondent accepted the payments. The respondent thereafter made representations under s 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court. The Industrial Court found the respondent's dismissal from the applicant's employment to be without just cause or excuse. The applicant applied for an order of certiorari to quash the entire decision of the Industrial Court. The High Court dismissed the applicant's application. Thus, this appeal. The issues for consideration were: (a) whether there were two separate legal entities; (b) whether the contracts of employment were fixed term contracts; and (c) whether the respondent who was a foreign national could be a permanent employee.

Held, allowing the appeal with costs:

(1) The applicant and AIMS Data Centre 2 were two separate legal entities. Thus, the respondent's six contracts of employment from 1 October 2009–31 December 2013 with two separate legal entities could not be treated as one continuous contract with the applicant. The utilisation of the term 'renewal' and the non-change of terms and conditions of a subsequent contract to the previous contract did not result in a continuous employment as the material fact remained that both contracts were entered with two separate legal entities. There was no evidence that the facts of the case demonstrated fraud or unconscionable conduct of the applicant. Thus, there were no grounds for the Industrial Court or the learned High Court judge to lift the corporate veils of AIMS Data Centre 2 and the applicant to treat the two separate entities as one (see paras 13, 15 & 17).

(2) The pertinent contracts of employment could only be between the applicant and the respondent ie the fourth to the sixth contracts. Since the offer of appointment was for a specified period of time, thus the employment contracts of the respondent with the applicant were fixed term contracts and that the early termination of the respondent was effected in accordance with cl 8. It was unfortunate that the learned High Court judge had concluded that the respondent's contract of employment with the applicant was a permanent contract without examining the terms and conditions of the relevant contract which had expressly stipulated a fixed term contract with a termination clause that could be effected by either the applicant or the respondent. The learned High Court judge had thus committed errors that warranted appellate intervention (see paras 18, 20, & 25–26).

(3) In Appendix A of the tenure and terms of the three month contract between the applicant and the respondent, cl 1(a) stipulated that the contract was 'subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia'. This would include the legal requirement to obtain a work permit from the relevant departments. Thus, it could not be said that an expatriate who required a work permit to work in Malaysia could be a permanent employee (see para 30).

[Bahasa Malaysia summary

Responden telah memasuki enam kontrak pekerjaan iaitu tiga kontrak pertama dengan AIMS Data Centre 2 Sdn Bhd ('AIMS Data Centre 2'), dan kontrak keempat hingga keenam dengan perayu, AIMS Cyberjaya Sdn Bhd ('pemohon'). Pada bulan September 2013 ketika kontrak keempat, responden menerima surat daripada pemohon yang menawarkan kepadanya pelantikan di bawah kontrak kelima. Responden tidak berpuas hati dengan terma kontrak kelima dan pemohon menawarkan kontrak keenam untuk jangka masa tiga

bulan. Menurut pemohon, tempoh kontrak tiga bulan adalah untuk memberi masa kepada responden untuk mempertimbangkan semula terma kontrak kelima. Pada 1 Oktober 2013, responden memberitahu pemohon bahawa dia tidak menerima kontrak kelima. Selaras dengan itu, pemohon mengeluarkan surat bertarikh 18 Oktober 2013 yang memberi responden pelepasan awal pekerjaannya dengan pemohon berkuatkuasa pada 19 Oktober 2013. Responden dibayar gaji penuh untuk bulan Oktober 2013 serta dua bulan gaji untuk baki dua bulan lagi iaitu November dan Disember sebagai ganti notis di bawah kontrak keenam. Responden menerima pembayaran tersebut. Seterusnya responden membuat representasi di bawah s 20 Akta Perhubungan Perusahaan 1967 agar perkara itu dirujuk ke Mahkamah Perusahaan. Mahkamah Perusahaan mendapati pemecatan responden daripada pemohon adalah tanpa sebab atau alasan adil. Pemohon memohon perintah certiorari untuk membatalkan keseluruhan keputusan Mahkamah Perusahaan. Mahkamah Tinggi menolak permohonan pemohon. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat dua entiti undang-undang yang berasingan; (b) sama ada kontrak pekerjaan adalah kontrak jangka tetap; dan (c) sama ada responden yang merupakan warganegara asing boleh menjadi pekerja tetap.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pemohon dan AIMS Data Centre 2 adalah dua entiti undang-undang yang berasingan. Oleh itu, enam kontrak pekerjaan responden dari 1 Oktober 2009 hingga 31 Disember 2013 dengan dua entiti undang-undang yang berasingan tidak dapat dianggap sebagai satu kontrak berterusan dengan pemohon. Penggunaan terma 'renewal' dan tidak berubahnya terma dan syarat kontrak berikutnya dengan kontrak sebelumnya tidak menghasilkan pekerjaan berterusan kerana hakikatnya tetap bahawa kedua-dua kontrak itu dimasuki dengan dua entiti undang-undang yang berasingan. Tidak ada keterangan bahawa fakta kes menunjukkan penipuan atau tindakan tidak berpatutan oleh pemohon. Oleh itu, tidak ada alasan untuk Mahkamah Perusahaan atau hakim Mahkamah Tinggi yang bijaksana untuk menyingkap tabir korporat AIMS Data Centre 2 dan pemohon untuk memperlakukan kedua-dua entiti yang berasingan itu sebagai satu (lihat perenggan 13, 15 & 17).

(2) Kontrak pekerjaan yang berkaitan adalah hanya antara pemohon dan responden iaitu kontrak keempat hingga keenam. Oleh kerana tawaran pelantikan adalah untuk tempoh masa yang ditentukan, oleh itu kontrak pekerjaan responden dengan pemohon adalah kontrak tempoh tetap dan bahawa penamatan awal responden dilakukan selaras dengan klausa 8. Malang sekali bahawa hakim Mahkamah Tinggi yang bijaksana telah menyimpulkan bahawa kontrak pekerjaan responden dengan pemohon adalah kontrak tetap tanpa memeriksa terma dan syarat kontrak yang relevan yang secara tegas menetapkan kontrak tempoh tetap dengan

klausa penamatan yang dapat dilaksanakan oleh pemohon atau responden. Oleh itu, hakim Mahkamah Tinggi yang bijaksana telah melakukan kesalahan yang memerlukan campur tangan rayuan (lihat perenggan 18, 20 & 25–26).

(3) Dalam Lampiran A tempoh perkhidmatan dan terma kontrak tiga bulan antara pemohon dan responden, klausa 1(a) menetapkan bahawa kontrak tersebut 'subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia'. Ini termasuk syarat undang-undang untuk mendapatkan permit kerja daripada jabatan yang berkenaan. Oleh itu, tidak dapat dikatakan bahawa seorang ekspatriat yang memerlukan permit kerja untuk bekerja di Malaysia boleh menjadi pekerja tetap (lihat perenggan 30).]

Cases referred to

Law Kam Loy and anor v Boltex Sdn Bhd and others [2005] MLJU 225; [2005] CLJ 355, CA (refd)

M Vasagam a/l Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 MLJ 262; [2003] 5 CLJ 448, HC (refd)

Mong Pak Nyong v IJM Plantations Bhd [2010] 2 LNS 0657, IC (refd)

Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd [2014] 1 ILJ 458; [2013] 2 LNS 1745, IC (refd)

Toko Inomoto & Ors v Malaysian Philharmonic Orchestra [2015] 2 LNS 1034, IC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review Application No WA-25–117–07 of 2016 (High Court, Kuala Lumpur)

(Shearn Delamore & Co) for the appellant.
(Bodipalar Ponnudurai De Silva) for the respondent.

Badariah Sahamid JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge, delivered on 24 August 2017, which dismissed the appellant's application for an order of certiorari to quash the entire decision of the Industrial Court in Award No 283 of 2016 which found the respondent's dismissal from the applicant's employment to be without just cause or excuse. The Industrial

Court had awarded back wages of 24 months and compensation of one and a half month's salary for each year of the respondent's completed service in lieu of reinstatement.

ISSUE

[2] The primary issue before the Industrial Court, the High Court as well as before us was whether on the facts and circumstances of this case, the respondent was employed on a fixed term contract or was a permanent employee of the appellant at the material time? In this respect both the Industrial Court and the High Court made concurrent findings that the respondent was a permanent employee of the appellant and in consequence thereof, his termination was invalid.

BACKGROUND FACTS

[3] The following salient facts are undisputed. For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[4] The respondent had entered into a total of six contracts of employment that was considered by both the Industrial Court and the High Court. It is to be noted that chronologically the first three contracts were with Aims Data Centre 2 Sdn Bhd, while the fourth to the sixth contracts were with the applicant, AIMS Cyberjaya Sdn Bhd.

[5] The six employment contracts are as follows:

(a) first contract: from 1 October 2009 (on six months' probation) as a consultant with Aims Data Centre 2 Sdn Bhd (pp 129–136 *RR*);

(b) second contract: from 1 October 2009–30 September 2010, as a consultant with Aims Data Centre 2 Sdn Bhd (pp 137–144 *RR*);

(c) third contract: from 1 October 2009 (on 6 months' probation) as Vice President, Product Development with Aims Data Centre 2 Sdn Bhd (pp 145–151 *RR*);

(d) fourth contract: from 1 October 2012–30 September 2013, (12 months) as a Consultant with AIMS Cyberjaya Sdn Bhd (p 123 *RR*);

(e) fifth contract: from 1 October 2013–30 September 2014 (12 months) as Vice President, Products and Solutions with AIMS Cyberjaya Sdn Bhd (pp 110–116 *RR*); and

(f) sixth contract: from 1 October 2013–31 December 2013 (three months) as Vice President, Products and Solutions with AIMS Cyberjaya Sdn Bhd (pp 103–109 of RR).

[6] Sometime in September 2013 during the duration of the fourth contract, the respondent received a letter from the applicant dated 10 September 2013 which offered him appointment under the fifth contract. The respondent had informed the applicant that he was unhappy with the terms of the fifth contract as the said contract had excluded the performance bonus scheme.

[7] After a discussion on 13 September between the respondent and the applicant, the applicant offered the respondent the sixth contract for a term of three months. According to the applicant, the three-month contract period from 1 October 2013–31 December 2013 was to provide the respondent time to reconsider the terms of the fifth contract.

[8] On 1 October 2013, the respondent informed the applicant that he was not accepting the fifth contract. Pursuant thereto, the applicant issued a letter dated 18 October 2013 which provided the respondent with an early release of his employment with the applicant with effect from 19 October 2013. The respondent was paid his full salary for the month of October 2013 as well as two months salary for the balance of the remaining two months vis November and December in lieu of notice under the sixth contract. The respondent accepted the aforementioned payments.

[9] The respondent thereafter made representations under s 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court. The Industrial Court delivered its decision in favour of the respondent in Award No 382 of 2016 dated 1 April 2016. The applicant applied for an order of certiorari to quash the entire decision of the Industrial Court. The High Court dismissed the applicant's application. Thus, the appeal before us.

FINDINGS AND DECISION OF THE HIGH COURT

[10] The findings and decision of the High Court may be summarised as follows. The High Court agreed with the finding of the Industrial Court that the respondent's contracts of employment with the applicant, AIMS Cyberjaya Sdn Bhd was a continuation of the respondent's contract of employment with AIMS Data Centre 2 Sdn Bhd, with no change in the terms and conditions of the previous contract of employment with AIMS Data Centre 2 Sdn Bhd and the subsequent contracts of employment with the applicant, AIMS Cyberjaya Sdn Bhd. The learned High Court judge had stated thus at paras 11–13 in Her Ladyship's 'Grounds of Judgment':

> 11. Accordingly, the Industrial Court was not found to have erred in its conclusion that the respondent was a permanent employee of the applicant and not its consultant and, that the respondent's contract of employment with the applicant

from 1 October 2012 was, in effect a continuation of the respondent's employment with ADC2 (Aims Data Centre 2 Sdn Bhd).

12. The respondent's original contract of employment dated 27 May 2009 with ADC2 did not provide for a fixed term contract but, was found to have been continuously renewed without any intermittent breaks since 2010.

13. Based on the respondent's first contract of employment with the applicant dated 18 October 2012, no changes was found in the terms and conditions of the respondent's 'renewed' employment from that of the respondent's contract of employment dated 26 August 2009. Thus, the respondent's contract of employment was rightly found by the Industrial Court to have been automatically executed by the applicant and, not renewed pursuant to the respondent's application. The respondent's contract with the applicant was clearly, a continuous and, successive contract with no intermittent breaks in between the preceding and the 'successor contract'.

OUR JUDGMENT

[11] After careful consideration of the written and oral submissions of learned counsels as well as the appeal records and relevant authorities, we are of the considered opinion that there are merits in this appeal. We therefore allow the applicant's appeal against the decision of the learned High Court judge to dismiss the applicant's application for a certiorari to quash the decision of the Industrial Court. Our reasons are stated below.

[12] Our reasons will focus on three main issues that were raised by the appellant/applicant in their memorandum of appeal:

(a) the issue of separate legal entity;

(b) the issue of whether the contracts of employment are fixed term contracts; and

(c) the issue of whether the respondent who is a foreign national, can be a permanent employee.

SEPARATE LEGAL ENTITY

[13] We agree with the submission of the applicant that the Industrial Court and the High Court had erred in law and fact in making the finding that the respondent's contract of employment with the applicant from 1 October 2012 was a continuation of the respondent's employment with AIMS Data Centre 2 Sdn Bhd in 2009. It is trite law that the applicant and AIMS Data Centre Sdn Bhd were two separate legal entities. Thus, the respondent's six contracts of employment from 1 October 2009–31 December 2013 with two separate legal entities cannot be treated as one continuous contract with the applicant.

A **[14]** In disregarding the separate legal entity of AIMS Data Centre 2 Sdn Bhd and the applicant, AIMS Cyberjaya Sdn Bhd, the learned High Court judge had taken into account the irrelevant factor that the respondent's contracts of employment had been 'renewed' successively every year since 2010 without a break although the renewals were made by two separate legal entities.

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[15] The learned High Court judge also took into account the irrelevant factor that the first contract with the applicant dated 18 October 2012 was headed 'Renewal of Contract' and stated that the respondent's contract would be 'renewed for 12 months' (1 October 2012–30 September 2013) and that, 'with this renewal, there shall be no change in your designation, grade and other terms and conditions of your contract dated 26 August 2009'. The foregoing utilisation of the term 'renewal' and the non-change of terms and conditions of a subsequent contract to the previous contract does not result in a continuous employment as the material fact remains that both contracts were entered with two separate legal entities.

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[16] Established authorities have held that there must be special circumstances, where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity that warrants the lifting of the corporate veil by either the Industrial Court or the High Court (refer to *Law Kam Loy & Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] CLJ 355).

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[17] There is no evidence that the facts of the instant case demonstrate fraud or unconscionable conduct of the applicant and neither did the learned High Court judge address this matter in her 'Grounds of Judgment'. Thus, there are no grounds for the Industrial Court or the learned High Court judge to lift the corporate veils of AIMS Data Centre 2 Sdn Bhd and the applicant, AIMS Cyberjaya Sdn Bhd to treat the two separate entities as one ie the applicant, AIMS Cyberjaya Sdn Bhd.

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FIXED TERM CONTRACTS

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[18] In the light of the above, the pertinent contracts of employment can only be between the applicant and the respondent ie the fourth to the sixth contracts as aforesaid:

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(a) the fourth contract: From 1 October 2012–30 September 2013 (12 months) as a Consultant with AIMS Cyberjaya Sdn Bhd (p 123 *RR*);

(b) the fifth contract: From 1 October 2013–30 September 2014 (12 months) as Vice President, Products and Solutions with AIMS Cyberjaya Sdn Bhd (pp 110–116 *RR*); and

(c) the sixth contract: From 1 October 2013–31 December 2013 (three months) as Vice President, Products and Solutions with AIMS Cyberjaya Sdn Bhd (pp 103–109 of *RR*). A

For the purposes of this appeal, the earlier contracts of employment between the respondent and AIMS Data Centre 2 Sdn Bhd (first to third contracts) must be disregarded. B

[19] The next question to ask is this: Are the three contracts abovementioned fixed term contracts or are the terms in the nature of a permanent employment with the applicant? C

[20] A perusal of each of the three contracts abovementioned stipulates the offer of appointment was for a specified period of time. The fourth contract stipulates the period of 12 months from 1 October 2012–30 September 2013. The fifth contract also stipulates a period of 12 months also from 1 October 2013–30 September 2014. The sixth contract stipulates a period of three months from 1 October 2013–31 December 2013. Thus the inescapable conclusion is that the employment contracts of the respondent with the applicant were fixed term contracts. A fixed term contract expires by effluxion of time (refer to *M Vasagam a/l Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 MLJ 262; [2003] 5 CLJ 448; *Mong Pak Nyong v IJM Plantations Bhd* [2010] 2 LNS 0657). D E

[21] Prior to the expiry of the first contract with the applicant (also referred to as the fourth contract), by letter dated 10 September 2013, the applicant had offered the respondent another contract also for a period of 12 months from 1 October 2013–30 September 2014 (also referred to as the fifth contract). The respondent was not agreeable to the fifth contract as it did not provide for a sales performance bonus. At this point therefore, the only subsisting contract between the respondent and the applicant was the fourth contract which had stipulated a fixed term from 1 October 2012–30 September 2013. F G

[22] Subsequently, prior to the expiry of the fourth contract, on the 18 September 2013, the applicant had offered the respondent a three-month contract for the period 1 October 2013–31 December 2013 (also referred to as the sixth contract). The respondent accepted the three month contract on 20 September 2013. However, on 1 October 2013, the respondent informed the applicant he was not accepting the fifth contract. At this point the subsisting contract (the fourth contract) had already expired by effluxion of time. What remained between the applicant and the respondent was only the three-month contract from 1 October 2013–31 December 2013. It was during the duration of this three-month contract, on 18 October 2013 that the respondent had issued a letter of 'early release', giving the applicant two H I

months' notice of expiry of the three months' contract with effect from 1 November 2013–31 December 2013.

[23] The question arises whether the applicant was entitled to unilaterally terminate the three-month contract before its expiry date? The answer to this question must be found in the terms and conditions of the contract therein.

[24] Appendix A provides the tenure and terms of the contract. Among the relevant terms are as follows:

> 1. (a) Your contract with AIMS Cyberjaya Sdn Bhd shall commence from *1 October 2013* for a period of 3 months ending *31 December 2013* subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia. This contract shall automatically terminate upon the expiry of the Contract term unless extended or renewed accordance with the provisions of clause 8.

In respect of termination, clause 1. (d) provides that either the respondent or the applicant may terminate the contract in accordance with clause 8 which provides as follows:

> 8. Termination
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> Your appointment may be terminated by giving two (2) months' notice. Such notice shall be given by the party that intends to effect termination. Where no notice is given, two (2) months salary in lieu of notice shall be payable by the party effecting such termination.

[25] It is clear from the above that the respondent was appointed under a fixed term contract of three months and that the early termination of the respondent was effected in accordance with cl 8 thereof. In addition, thereto, cl 1(e) had expressly confined the terms of the contract to Appendix A as follows:

> 1. (e) This contract shall supersede all other contracts previously issued under AIMS Data Centre 2 Sdn Bhd and AIMS Data Centre Pte. Ltd.

[26] It is unfortunate that the learned High Court judge had concluded that the respondent's contract of employment with the applicant was a permanent contract without examining the terms and conditions of the relevant contract which had expressly stipulated a fixed term contract with a termination clause that can be effected by either the applicant or the respondent. The learned High Court judge had thus committed errors that warrant appellate intervention.

CAN A FOREIGN NATIONAL BE A PERMANENT EMPLOYEE?

[27] In our view, the status of the respondent as an employee on a fixed term contract or a permanent employee of the applicant can and has been

determined by the facts and circumstances of the case as well as the specific terms and conditions of the material contracts. However, for the sake of completeness, we will deal with the issue of whether a foreign national can be a permanent employee of a Malaysian company?

[28] It is not disputed that the respondent was and is a citizen of Singapore. The question that arises is whether the respondent who was a foreign national can be a permanent employee of the applicant? We note that neither the Industrial Court nor the learned High Court judge had addressed this issue although it was a relevant factor in determining whether the respondent was a permanent employee.

[29] In respect of an expatriate employee, authorities have held that there cannot be a permanent employment. In the case of *Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd* [2014] 1 ILJ 458; [2013] 2 LNS 1745 which was also referred to in the case of *Toko Inomoto & Ors v Malaysian Philharmonic Orchestra* [2015] 2 LNS 1034 (recently affirmed by the High Court in Suit No 25–300–11 of 2015), the case involved a pilot who was a foreign national who was engaged under a series of successive contracts which had been renewed several times. He claimed that he was a permanent employee. The learned Chairman Nayagam held that:

> This is the normal practice where companies employ foreigners to work for them as a stop gap measure as it requires a valid work pass, which is only for a limited period and can be cancelled if there has been a breach of any condition attached to it. This is reason the claimant's contracts were subject to him obtaining a work pass. In the circumstances, it is not reasonable for the claimant as a foreign workman to say that he expected to work in Malaysia on a permanent basis, just because his fixed term contract was renewed'

[30] In the instant case, we note that in Appendix A of the Tenure and Terms of the three month contract between the applicant and the respondent, cl 1(a) stipulates that the contract was 'subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia'. This would include the legal requirement to obtain a work permit from the relevant departments. Thus, it cannot be said that an expatriate who requires a work permit to work in Malaysia can be a permanent employee.

[31] In conclusion, for the foregoing reasons we are of the considered view that there are appealable errors in the concurrent findings of the Industrial Court and the High Court which warrant appellate intervention. The decision of the High Court dismissing the applicant's application for an order of certiorari is set aside. Accordingly, we allow this appeal with costs.

A *Appeal allowed with costs.*

Reported by Ahmad Ismail Illman Mohd Razali

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